IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975.
No. 75-1206.

JULIAN WEINER, et al.,

Petitioners,

vs.

MALCOLM M. LUCAS, Judge of the United States District Court for the Central District of California, et al.,

Respondents.

REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

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Pursuant to Rule 24 of this Court, Petitioners Marvin A. Lichtig, Julian S.H. Weiner and Solomon Block file this Reply to Brief for Respondents in Opposition.

I. THE PETITIONERS DO NOT LACK JURISDICTION SINCE THEY WERE PARTIES TO THE PRIOR PROCEEDINGS.

The respondents incorrectly assert that this Court lacks jurisdiction

because none of the petitioners were parties to the proceedings before the United States Court of Appeals for the Ninth Circuit (herein the "Court of Appeals"). On the contrary, court records of Docket No. 7535-71 contain a document filed and docketed in the Court of Appeals on November 25, 1975, which gave notice of the joinder therein of the named parties of this petition, Messrs. Lichtig, Weiner and Block.

It is a pity that the respondents have obfuscated the issues of this petition by asserting unsubstantiated allegations that are contradicted by a simple review of the appropriate court records.

II. THE PETITIONER IS IN COMPLIANCE WITH THE PROVISIONS OF RULE 19 OF THIS COURT.

The respondents contend that the petition does not present an issue within the parameters of Rule 19 of this Court but merely presents "a most mundane questions of discovery scheduling." [1] Such an assertion is unfounded

1. Discovery Order #2 in M.D.L. Docket No.142 requiring multiple simultaneous nationwide depositions, which have been cancelled or rescheduled without reasonable notice (see affidavit attached hereto) is a severely prejudicial abuse of discretion which can hardly be considered a "mundane question of discovery scheduling."

because the petition presents two of the reasons set forth in Rule 19 as supportive of granting a review on writ of certiorari:

> "(b) Where a court of appeals has...decided an important question of federal law which has not been, but should be, settled by this court;...or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

A. The Discovery Order Constitutes A Significant Departure From The Accepted And Usual Course Of Judicial Proceedings.

The Discovery Order #2 in M.D.L. Docket No. 142 (herein the "Order") permitting simultaneous depositions, exceeds the discretion allowed by Rule 26 of the Federal Rules of Civil Procedure (herein the "Federal Rules"). More important, it frustrates the policy of fundamental due process promulgated by the Federal Rules. One of the purposes of Rule 26, was to avoid the "sterilization" which would result to a party if he were denied an equal and adequate opportunity to be heard.[2] The

2 See Caldwell-Clements, Inc. v. McGraw-Hill Pub. Co., 11 F.R.D. 156 (S.D.N.Y. 1951), discussed at pages 8 and 9 of the original petition.

scheduling of simultaneous depositions has of necessity resulted in delays and lack of notice (see attached affidavit) and has made it nearly impossible for those firms with limited resources to provide their clients with effective assistance of counsel by attending the depositions.

For the above reasons, the order constitutes a significant departure from the "accepted and usual course of judicial proceedings" and certainly presents an issue worthy of this Court's consideration pursuant to Rule 19.

B. The Discovery Order Presents An Important Question Of Federal Law Not Yet Answered.

The issue is the extent to which a court may employ the Federal Rules to force a party to comply with this most burdensome Order.[3] Also, the limitations on the discretion of the court regarding the timing and number of depositions on a given day should be defined by this court to preclude any further abuses. Therefore, the petition presents "an important question of federal law which has not been, but should be, settled by this court."

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3 The original petition at pages 4,5 and "Appendix C",pp.1-5 details the prejudice and burden resulting to petitioners from the order.

III. THE ORDER'S REQUIREMENT OF MULTIPLE SIMULTANEOUS DEPOSITIONS JUSTIFIES THE ISSUANCE OF A WRIT OF MANDAMUS.

A. The Order Constitutes An Improper Abuse Of Discretion Because It Deprives Petitioners Of Their Due Process Rights.

Discovery Order No. 2, specifies on page two, paragraph two, that the deposition schedule was promulgated under the authority of Rule 26(d) of the Federal Rules of Civil Procedure.

However, the court, in "allowing and requiring concurrent depositions" (emphasis added) exceeded the mandate of the above Rule 26(d). First of all, the essence of Rule 26(d) is that discovery may proceed in any manner as long as such discovery does "not operate to delay any other party's discovery." That mandate is critical in this case.

In addition, Rule 26(d) specifically allows the court, upon motion, to order a method or sequence of discovery "for the convenience of parties and witnesses and in the interests of justice." (emphasis added) Nowhere in Rule 26(d) is there to be found any implication that a court has the power to order concurrent, or, as in this case, simultaneous, depositions. Such an order in the present case certainly does not allow depositions to be taken "for the convenience" of any parties and witnesses

except those represented by the larger law firms, which are able (both physically and financially) to attend simultaneous depositions.

There are well over one hundred nation-wide depositions scheduled under Discovery Order No. 2 in this case, and the plaintiffs in M.D.L. Docket No. 142, are represented by many times the number of attorneys and firms that are available to the defendants/petitioners.

As a result, the only conceivable avenue of relief available to the petitioners would be to retain, as co-counsel, a battery of attorneys accross the country to attend the scheduled depositions. Otherwise, petitioners will be deprived of their right to gather evidence and object to testimony, which relates directly to their ability to defend themselves. The court in this case has no right or power to force such an unfair decision upon the petitioners.

"A trial court has a duty, of special significance in lengthy and complex cases where the possibility of abuse is always present, to supervise and limit discovery to protect parties and witnesses from annoyance and excessive expense. Dolgow v. Anderson, 53 F.R.D. 661 (E.D.N.Y 1971) (emphasis added).

"'[T]he problem is to permit a litigant to obtain whatever information he may need to prepare adequately for the issues that may develop, without

imposing an onerous burden of information gathering on his adversary'." Dolgow, supra, at page 664 (emphasis added).

Petitioners in this case cannot possibly afford to retain sufficient quantities of counsel to attend the ordered schedule of depositions. As a result, petitioners are being denied their right to gather vital information and make discovery objections in the preparation of their defense and are accordingly being denied their right to due process under the Fifth Amendment to the United States Constitution.

Of utmost importance in this case is the fact that petitioners are struggling to cope with a schedule of depositions which was forced upon them by court order; petitioners did not voluntarily burden themselves with such an impossible task. In Christhilf v. Annapolis Emergency Hospital Association, Inc., 496 F.2d 174 (4th Cir. 1974), the Court of Appeals specifically stated that

> "'The fundamental requisite of due process of law'...embraces an 'adequate opportunity...to defend...'." Christhilf, supra, at page 178, citing Louisville and Nashville R.R.Co. v. Schmidt, 177 U.S. 230, 236, 20 S.Ct. 620, 44 L.Ed. 747 (1900) (emphasis added).

Similarly in the case of S.S.Kresge Company v. N.L.R.B., 416 F.2d 1225 (6th Cir. 1969), the Court reiterated that

"It is an essential element of due process that an interested party be given...an opportunity to prepare a defense..." 416 F.2d at pages 1234, 1235 (emphasis added).

Petitioners' deprivation in this case derives not solely from the sheer quantity of depositions in this complex case, but, also from the inability of the available attorneys to attend the scheduled depositions (which are sometimes simultaneous) in the limited time span alloted by Discovery Order No. 2 (until October 1, 1976). If the court-ordered schedule is allowed to stand, petitioners will be substantially hindered in their attempts to defend themselves.

It is elementary that the right to due process includes the availability of a reasonable opportunity to learn of the claims of the opposing party and to be able to meet them with an adequately prepared defense. See, Gonzales v. United States, 348 U.S. 407, 75 S.Ct. 409, 99 L.Ed. 467 (1955); United States v. Cabbage, 430 F.2d 1037 (4th Cir. 1970).

As was succinctly stated in Cinema Amusements v. Loew's,Inc., 7 F.R.D. 318 (D. Delaware, 1947):

"[D]iscovery has ultimate and necessary boundaries and... those boundaries are reached when they result in oppression of the opposite party." 7 F.R.D at page 320, citing Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1946).

Further evidence that petitioners are being denied their due process rights is that the deposition schedule has resulted in depositions being taken without reasonable notice (see attached affidavit).

In paragraph 4 of the Order the District Court recognized that with such a burdensome deposition schedule, at least ten days notice would be required. However, this principle of fairness has in fact been contradicted by the practicalities of implementing the Order's discovery schedule. Numerous last minute changes in scheduling have occurred, all to the disruption of petitioners' ability to defend themselves (see attached affidavit).

B. A Supervisory Writ of Mandamus Should Be Issued.

A discovery order that exceeds the limits of the court's proper discretion and results in substantial prejudice to the rights of the parties constitutes an abuse of discretion. Huff v. N.D. Cass Company of Alabama, 468 F.2d 172, 176 (5th Cir. 1972). In such event, a supervisory power of mandamus should be issued. In Heathman v. United States Dist. Ct. for Cent. Dist. of Cal. 503 F.2d 1032 (9th Cir.1974) the court noted, inter alia, that where a petition for writ of mandamus raises issues concerning scope of civil discovery, the resolution of which is necessary to prevent potential irreparable loss of petitioners' rights, the court must consider the merits of the petition.

Discovery is an area where courts have a wide amount of discretion. For that reason it is often necessary to supervise such orders. A writ of supervisory mandamus has been viewed as an appropriate means of review.

> "Discovery orders are virtually non-reviewable by ordinary process. Yet their impact on litigants is so severe that the courts have tolerated impermissible devices for securing review...To the extent that discovery practices present questions of law capable of general resolution,

> supervisory mandamus would seem to be the ideal solution." 9 MOORE'S FEDERAL PRACTICE ¶ 110.28 (2nd Ed. 1975)(emphasis added)

A writ of mandamus has been issued under circumstances analogous to the instant case. In Colonial Times, Inc., v Gasch, (509 F.2d 517 (D.C.Cir.1975), the disputed order improperly interpreted the manner of taking depositions under Rule 30 (b)(4)to prohibit means other than stenography. Even though the order was only an error regarding the manner in which discovery depositions should proceed, it nevertheless was deemed an abuse of discretion worthy of the issuance of a writ of supervisory mandamus. In reversing the order, the court stated,

> "...The essential didactic and expository function of supervisory mandamus is thus best served in situations such as the one we face here...we find that mandamus lies in this case because the issue of discovery involved is one of first impression and is important to the administration of discovery. The error asserted concerns a misapprehension of the basic purpose of the discovery rule in issue-that is, the use of irrelevant

factors in decision and a failure to consider certain relevant factors..." 509 F.2d at 525-526.[4]

The court went on to apply the standards established in Schlagenhauf v. Holden, 379 U.S.104 (1964)-- a case cited by respondents:

> "Schlagenahuf authorizes departure from the final judgment rule when the appellant court is convinced that resolution of an important, undecided issue will forestall future error in trial courts, eliminate uncertainty and add importantly to the efficient administration of justice." 509 F.2d at 524.

The principle of Schlagenhauf has been applied by other Circuits as well in the area of discovery. Atlass v. Miner, 265 F.2d 312 (7th Cir.1959) aff'd. 363 U.S.641, (1960). Securities and Exchange Commission v. Krentzman, 397 F.2d 55, 59 (5th Cir.1968);

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[4] The court also distinguished a case cited by respondents, Will v. United States, 389 U.S. 90 (1967), noting that the holding of Schlagenhauf is not affected by Will. 509 F.2d at 524 Ftn.21

In International Business Machines Corp. v. United States, 471 F.2d 507, 516 (2nd Cir. 1972) a discovery order denying the existence of a work-product privilege, was reversed.

> "Although as a general rule, ordinary discovery orders should not be appealable, occasionally there arises a discovery question presenting a question of law capable of general resolution; under such circumstances, appellate review by supervisory mandamus provides a logical method by which to supervise the administration of justice within the circuit." See also, Atlass v. Miner, supra, (concerning reversal of discovery order compelling testimony at a deposition.)

The present facts indicate that the issuance of a writ of mandamus is appropriate. As in Colonial Times Inc. v. Gasch, supra, the Order in the present case misapprehends the basic purpose of the Federal Rule 26. The rule sought to provide all parties with an equal and adequate opportunity to be heard; the Order, on the other

hand, increases the likelihood that petitioners will not be able to attend simultaneous depositions and the defendants will be denied their rights to due process. The rule increases rather than eliminates uncertainty. The numerous unscheduled changes have increased the burden of attending the multiple simultaneous depositions. Such changes have occurred without notice (See attached affidavits).

The respondents are incorrect in claiming that the petitioners have no interest in the depositions of the trading defendants. On the contrary, the petitioners have already been named parties along with the trading defendants in Alfred University et. al. v. Wolfson Weiner Ratoff & Lapin, et.al. (S.D.N.Y. No.76-1081) The petitioners therefore have a direct interest in any testimony given by a co-defendant.

In, In re Equity Funding Corp. of America Securities Litigation, 375 F. Supp. 1378 (J.P.M.L. 1974),the decision which consolidated the cases in M.D.L. 142, the court acknowledged that the issues involved in the Equity Funding concerned all of the consolidated defendants.

Finally, the Order fails to consider and accommodate those firms whose small size and limited resources make it virtually impossible to attend multiple simultaneous nationwide depositions.

Immediate review is necessary or the Petitioners will suffer irreparable injury.

The respondents argue that any interlocutory review would have a dilatory effect on the litigation. Any such risk is minimal in light of the possible prejudice petitioners will be forced to suffer.

> "Our practice has been to balance the policy underlying the final judgment r[illegible] against the claim in an individual case that justice and the effective administration of our courts demands immediate review. Securities and Exchange Commission v. Stewart. 476 F.2d 755, 765 (2nd Cir. 1973) (dissenting opinion of Justice Timbers).

In the case at bar, if review is not made at this juncture it would be difficult or nearly impossible to later review the prejudicial effect of such depositions after trial.

This is not a case involving the admissibility of a single deposition that could later be evaluated and appropriate action taken on appeal. The thrust of the petitioners' argument is that adequate preparation by a defense will be prejudiced by conduct occurring for more than one year. Once the right to effective discovery in accordance with Federal Rule 26 has slipped by, it will for all practical purposes be lost. cf. Swift & Co. Packers v. Compania Columbiana Del Caribe, 339 U.S. 684 (1950) (order vacating writ of attachment reversed where appellate review would be ineffective after release of security).

IV. CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Dated: April 1, 1976.

Respectfully submitted,

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AFFIDAVIT OF PAUL R. SALERNO

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, Paul R. Salerno, being first duly sworn, state the following:

1. I am an attorney duly admitted to practice before the United States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit, and am an associate of the Law Offices of Richard A. DeSantis and am one of the counsel of record for Marvin A. Lichtig.

2. Stated below are the facts evidencing the oppression resulting to petitioners from the deposition schedule in M.D.L. Docket No. 142.

In the past five months, this law office has constantly received last minute notices of changes in the dates and locations of depositions. These persistent last minute notices make it extremely difficult for this law office to arrange for preparation concerning and attendance at said depositions.

3. On March 15, 1976, this law office received a notice that the deposition of Merle Wick, previously scheduled for Monday, March 15, at 10:00 a.m., had been rescheduled to Friday, March 12, at 10:00 a.m. The date of the notice was March 10, 1976. This office had an attorney available

to attend the deposition in New York City, but it was impossible for us to arrange for said attorney to attend this deposition because this notice was received after the deposition had taken place.

4. On March 15, 1976, this law office received notice that the deposition of Jarvis J. Slade would commence on March 16, 1976, the deposition of Hamilton Robinson, Jr. would commence on March 16, 1976, and the deposition of Hans S. Sammer would commence on March 18, 1976.

5. On February 23, 1976, this law office received a notice that the deposition of Ray Pratt would commence on February 24, 1976, and that the deposition of Benjamin Pass would commence on March 1, 1976. Already scheduled for the 23rd and 24th of February were the depositions of Ray L. Horn and Edward Ermann, John Ryan, William Cory and William Blundell.

6. On February 23, 1976, this law office received notice that the deposition of William Blundell would commence on February 24, 1976.

7. On March 3, 1976, this law office received notice that the deposition of Philip DeFliese would commence on March 8, 1976.

8. On March 16, 1976, this law office received a notice that the deposition of Walter Reilly would commence on March 15, 1976.

9. In addition to receiving late notice of depositions being taken, this law office has not been informed of depositions that had been noticed but were cancelled. On March 22, 1976, an attorney from this office appeared at plaintiff's steering committee headquarters to attend the deposition of Herbert Glaser and said attorney was told that this deposition had been cancelled. Our records indicate that no notice of this cancellation had been sent to this office. On March 29, 1976, one of our attorneys appeared at the noticed depositions of the Bache people scheduled in New York and was told that the depositions of the Bache people were not going to proceed. According to the records maintained in our office, we received no notice of the cancellation of these depositions.

10. According to the records maintained by this law office, the number and location of depositions in MDL Docket 142 for the past three months are the following:

Date	Number of Depositions	Location
1/5/76	5	New York
1/6/76	5	New York Los Angeles
1/7/76	4	New York Los Angeles

*Not listed are the dates when only one or two depositions were scheduled.

Date	Number of Depositions	Location
1/8/76	4	New York
1/9/76	3	New York Chicago
1/13/76	3	New York Los Angeles
1/14/76	3	New York Los Angeles
1/15/76	4	New York Los Angeles
1/16/76	3	New York
1/21/76	3	New York
1/22/76	4	New York Los Angeles
1/23/76	4	New York
1/26/76	6	New York
1/27/76	5	New York
1/28/76	5	New York
1/29/76	4	New York
1/30/76	3	New York
2/2/76	3	Los Angeles New York
2/3/76	3	Los Angeles New York
2/5/76	4	Los Angeles New York
2/6/76	3	Los Angeles New York
2/9/76	6	New York Los Angeles Pittsburgh
2/10/76	7	Los Angeles New York Pittsburgh
2/11/76	8	New York Los Angeles Pittsburgh

Date	Number of Depositions	Location
2/12/76	3	Los Angeles
2/13/76	3	Los Angeles New York
2/17/76	5	New York
2/18/76	5	New York Los Angeles
2/20/76	5	Atlanta New York
2/24/76	4	Los Angeles
2/25/76	4	Los Angeles
2/26/76	7	Los Angeles New York
2/27/76	6	Los Angeles New York
3/2/76	8	New York, Los Angeles and Atlanta
3/3/76	7	Los Angeles, Denver, New York Atlanta
3/4/76	9	New York, Los Angeles, Atlanta
3/5/76	6	New York, Los Angeles,Phoenix
3/8/76	6	Los Angeles, New York
3/9/76	5	New York, Los Angeles, San Francisco
3/10/76	6	New York, Los Angeles, San Francisco
3/11/76	3	New York, Phoenix Danville, Pa.
3/15/76	3	Los Angeles
3/16/76	3	Los Angeles Hartford, Conn.

Date	Number of Depositions	Location
3/18/76	5	New York, Houston Los Angeles
3/19/76	5	New York, Waco, Texas, Los Angeles
3/22/76	5	New York, Los Angeles
3/29/76	4	Denver, Los Angeles, Richmond, Va.

Because of the numerous last minute changes made in the deposition schedule and the problems encountered by this office in receiving adequate notice of cancellations, our records may not reflect in total accuracy the number of depositions that were actually taken. However, taking notice of the depositions scheduled does reveal the burden imposed upon petitioners.

11. During the above referenced dates this law office employed, at most,five attorneys and the law office of Abeles & Markowitz employed at most, six attorneys. Because of these numbers, this law office and the law office of Abeles & Markowitz have had to allow certain depositions to take place without any attendance by counsel for petitioners.

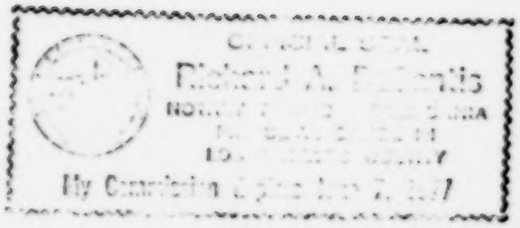
12. Discovery Order #2 calls for the depositions to be taken until October, 1976. Petitioners expect that the above described burdens upon them will continue for at least that long.

Executed at Los Angeles,
California this 1st day of April, 1976.

PAUL R. SALERNO

Subscribed and Sworn
to before me this
1st day of April,
1976,

Notary Public in and
for said County
and State



CERTIFICATE OF SERVICE

I certify that this 1st day of April, 1976, I caused three copies of the within Reply Brief for Respondents In Opposition to be served upon each of the respondents named in the Brief In Opposition, upon the nominal respondent, and upon the Solicitor General of the United States by United States Mail addressed to said respondents' respective counsel, to the nominal respondent, and to the Solicitor General.

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